OAH 7-0320-22993-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Bruce Schwichtenberg,
Schwichtenberg for Senate,

Complainant,

vs.

Julianne Ortman, Ortman for Senate Committee,

Respondents.

PROBABLE CAUSE ORDER

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge (ALJ) Richard C. Luis on August 7, 2012. This matter was convened to consider a Campaign Complaint filed with the Office of Administrative Hearings by Bruce Schwichtenberg on August 1, 2012. The probable cause hearing was conducted by telephone conference call.

Bruce Schwichtenberg (Complainant) appeared on his own behalf, and on behalf of Schwichtenberg for Senate, without counsel. John A. Knapp and Tammera Diehm, Winthrop and Weinstine, appeared on behalf of Senator Julianne Ortman and Ortman for Senate Committee (Respondents).

Based on the record and all the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED:

That this matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for hearing pursuant to Minnesota Statute § 211B.35. It is so ordered because the Administrative Law Judge finds there is probable cause to believe that Respondents violated Minnesota Statute § 211B.02 by using the word "Republican" on Senator Ortman's campaign lawn signs.

Dated: August 13th, 2012

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

The Complainant, Bruce Schwichtenberg, and Respondent, State Senator Julianne Ortman, are Republican Party candidates for the Minnesota Senate District 47 (Carver County) seat in the August 14, 2012, primary election. Neither has the endorsement of the Republican Party. The Senate District 47 Republicans decided not to endorse either candidate at the endorsing convention as both failed to obtain the necessary 60 percent of the votes after five rounds of balloting.

On August 1, 2012, the Complainant filed a Campaign Complaint alleging that Senator Ortman has falsely implied on campaign lawn signs promoting her candidacy that she has the Republican endorsement. The record reflects Ortman lawn signs of two designs posted throughout the district. They state:

Vote August 14 Julianne Ortman Republican for Minnesota Senate	and	Julianne Ortman Republican for State Senate

The Complaint contends that by using the word "Republican" on her campaign signs, Senator Ortman has violated Minn. Stat. § 211B.02 by falsely implying that she has the Republican Party endorsement.

Fair Campaign Practices Act

Minnesota Statutes § 211B.02 of the Fair Campaign Practices Act[1] provides in relevant part as follows:

> **211B.02 False Claim of Support**.
>
> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party unit or of an organization.

At the probable cause hearing, Senator Ortman stated that she is, in fact, a Republican, but she has never claimed in her campaign that she has been endorsed by the Minnesota Republican Party. She helped design the signage, and intentionally identifies herself as a Republican on the signs. Senator Ortman's purpose in saying she was a Republican was to inform voters of that fact and to remind them that her name would be on the Republican ballot in the August 14 primary.

The Complainant argued that since Ms. Ortman has been in the Senate for ten years, and is an attorney, she knows that her signs intentionally misrepresent that she has party endorsement.

[1] Minn. Stat. Chap. 211B.

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.[2] If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict or acquittal, a motion to dismiss for lack of probable cause should be denied.[3] A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

In order to violate Minn. Stat. § 211B.02, a person or candidate must *knowingly* make a false claim stating or implying that the candidate has a major political party or party unit's endorsement.

In *Schmitt v. McLaughlin,*[4] the Minnesota Supreme Court held that a candidate's use of the initials "DFL" falsely implied that the candidate had the endorsement of the DFL party in violation of Minnesota election law.[5] The court explained that, while candidates have a right to inform voters of their party affiliation "by the use of such words as 'member of' or 'affiliated with' in conjunction with the initials 'DFL,'" the use of the initials without such modifiers falsely implies to the average voter that the candidate is endorsed or at the very least has the support of the DFL party.[6]

Respondent Ortman argues that the use of the word "Republican" on her campaign lawn signs does not state or imply party endorsement. In addition, Respondent asserts that the likelihood of confusion is less in a partisan race, such as the upcoming primary, than in a non-partisan race, such as the one at issue in *Schmitt*. According to the Respondent, the word "Republican" simply informs the voters of her party affiliation and that she is running in the Republican primary.

Minn. Stat. § 211B.02 prohibits a candidate from knowingly making a false claim implying party support or endorsement. There is no exception provided in the statute for partisan races. In addition, the Minnesota Supreme Court has held in two other

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[2] *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

[3] *Id*. at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.*, Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

[4] 275 N.W.2d 587, 591 (Minn. 1979) (discussing Minn. Stat. § 210A.02, predecessor to Minn. Stat. § 211B.02).

[5] *Accord, In the Matter of the Election of Ryan*, 303 N.W.2d 462 (Minn. 1981).

[6] 275 N.W.2d at 591.

cases decided since the *Schmitt* case that use of the initials "DFL," without modifiers such as "member" or "affiliate," implies endorsement to the average voter.[7] In none of these decisions did the Minnesota Supreme Court find the partisan or non-partisan nature of the race to be a determinative factor.

The material facts in this case are not in dispute. Senator Ortman does not have the Republican Party's endorsement, yet she has used the word "Republican" on campaign material. Based on the line of decisions prohibiting the use of the initials "DFL" by a non-endorsed candidate, the Administrative Law Judge finds there is probable cause to believe a violation of Section 211B.02 has occurred. This matter will be referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for an evidentiary hearing.

First Amendment Issues

Senator Ortman argues that consideration should be given to the fact that campaign law has evolved significantly since the Minnesota Supreme Court's 1979 decision in *Schmitt v. McLaughlin*. In particular, Ortman urges consideration of a decision issued by the United States Supreme Court less than 60 days ago, which she maintains connotes a significant shift in the way laws restricting speech can be interpreted.

In *United States v. Alvarez*,[8] the United States Supreme Court considered the constitutionality of a law prohibiting individuals from claiming falsely that they had received military decorations or medals, with enhanced criminal penalties if the Congressional Medal of Honor was involved. The statutory provision, known as the "Stolen Valor Act," was overturned by the Ninth Circuit Court of Appeals, and the Supreme Court affirmed, declaring that the test for reviewing the constitutionality of speech under the First Amendment is not as simple as merely determining whether the statement is true or false.

The Supreme Court reasoned that because free speech is a fundamental right, the Constitution demands that content-based restrictions on speech be presumed invalid, and that the government bears the burden of showing they are constitutional. In *Alvarez*, the Court acknowledged that the Government has an interest in protecting the integrity of the Medal of Honor, but noted that the First Amendment requires that there be a direct causal link between the restriction imposed on the speech and the injury to be prevented, which the Court was unable to find.

It is noted that following the issuance of the *Alvarez* opinion, the United States Supreme Court denied a Petition to Consider a Minnesota Fair Campaign Practices Act case that addressed false statements related to a proposed ballot initiative, sending the

[7] *In the Matter of the Election of Ryan*, 303 N.W.2d 462 (Minn. 1981); and *Dougherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984). See also, *Stone v. Supporters of Carol Kummer for Park Board Commission*, OAH Docket No. 3-6326-16853-CV (Order dated October 13, 2005).
[8] 567 U.S. ___ (2012), Case No. 11-2010, 6/28/12.

case back to the Eighth Circuit to be reassessed in light of *Alvarez*.[9] The Petition was brought by three Minnesota-based grassroots advocacy organizations that challenged Minn. Stat. § 211B.06, which makes it a crime to knowingly, or with reckless disregard for the truth, make a false statement about a proposed ballot initiative.

Ms. Ortman emphasizes that the statements she made are not false and were not made with reckless disregard for the truth. The Respondents urge further that if a statute criminalizing false campaign statements in the context of a ballot initiative is of questionable constitutionality, clearly a factually accurate statement, such as the use of the descriptor "Republican" by a candidate for public office must be protected speech under the First Amendment.

Senator Ortman asserts that if there is any possible interpretation of her use of the word "Republican" other than to claim an endorsement, that the speech is constitutionally protected. And, since it is not disputed that Senator Ortman is a Republican, or that her stated intent using that word was to identify the race in which she is running (rather than to imply an endorsement), her speech should be constitutionally protected. She contends her running in the Republican primary, on the Republican ballot, bolsters the identity of her as a Republican, which is the real point of the signs and literature at issue.[10]

Mr. Schwichtenberg urges that probable cause be found that Senator Ortman violated Minn. Stat. § 211B.02 by implying she had received the endorsement of the Minnesota Republican Party when she identified herself as a "Republican" on campaign signs and campaign literature.

The Administrative Law Judge is persuaded that the *Schmitt v. McLaughlin* line of cases are still good law in Minnesota and is not convinced that *Alvarez*, which does not address political speech, requires dismissing the Complaint for lack of probable cause. Given the facts disclosed by the record, which, standing alone, may imply to a reasonable voter that Senator Ortman's signs claim Party endorsement, the Administrative Law Judge is satisfied that it is appropriate to require the Respondents to go to a hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.02.

Whether *Alvarez* compels dismissal of this Complaint because Senator Ortman's use of "Republican" on her signs is protected speech is a matter for the three-judge panel to decide.

Remedies

Mr. Schwichtenberg asks for relief beyond a granting of an evidentiary hearing before a panel of three Administrative Law Judges under Minn. Stat. § 211B.35. He

[9] See, *281 Care Committee v. Arneson*, petition denied June 29, 2012 (Sup. Ct. 11-535); http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-535.htm.

[10] *Wisconsin Right to Life, Inc. v. FEC*, 551 U.S. 449 (2007). Political Speech, meaning cannot be "implied" but must be expressly stated for it to be subject to regulation or criminal violation.

requests the Administrative Law Judge to order the Ortman campaign to take down the signs in question within 24 hours, that he be reimbursed for campaign expenses since the endorsing convention (based on the fact that Ortman has "cheated"), and any other relief the ALJ deems appropriate.

As explained at the probable cause hearing, the Administrative Law Judge is without authority to grant unilaterally any of Mr. Schwichtenberg's requests for relief, beyond referring the matter to the Chief Administrative Law Judge for assignment to a three-judge panel, which will hear the case within ten days of assignment from the Chief Judge.[11] The imposition of sanctions is inappropriate for a single Administrative Law Judge charged with deciding probable cause.

R.C.L.

[11] Minn. Stat. § 211B.35, subd. 1(1).